UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ZHONGWEI ZHOU, *et al.*,

Plaintiffs,

v.

DOROTHEA WU, *et al.*,

Defendants.

Civil Action No. 14-cv-01775-RJS
[rel. 1:12-cv-07135-RJS]

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

This Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") action follows on the heels of a related lawsuit *Sun et al., v. Wu, et al.*, Index Number 12-cv-7135 (RJS). In this action, the Plaintiffs allege virtually identical claims that the plaintiffs in the *Sun* action alleged – namely that Defendants failed to pay the Plaintiffs wages in accordance with federal and state law. Furthermore, in both the *Sun* action and in this action, the Plaintiffs assert that the Court should apply the extraordinary remedy of "equitable tolling" in order to extend the statute of limitations for Plaintiffs' wage claims well beyond the ordinary three year statute of limitations for claims pursuant to the FLSA and the ordinary six year statute of limitations for claims pursuant to the NYLL. In the *Sun* action, the court emphatically rejected Plaintiffs' request for equitable tolling, granted Defendants' motion for summary judgment and dismissed those plaintiffs' claims which arose prior to the applicable statute of limitations period. As discussed in more detail below, the court's holding in the *Sun* action should apply here. Plaintiffs' bid for equitable tolling — while fatally flawed in several respects — is ultimately doomed because there is no compelling legal or factual basis to apply a remedy reserved for only "exceptional" circumstances to their garden variety wage-and-hour claims.

First, Plaintiffs in the present action ignore the concept of a limitations period altogether, and insist all of their claims should be collectively tolled back to the date that each Plaintiff began working at the Restaurant. In spite of these claims, the statute of limitation of Plaintiffs' NYLL claims should be March 20, 2008, six years preceding the filing of the complaint in this action. Likewise, the maximum statute of limitation of Plaintiffs' FLSA claims should be March 20, 2011, three years preceding the filing of the complaint in this action. These dates are important, because they frame *who* can get *what* time period(s) tolled and *why*. For example, Zhongwei Zhou, a Plaintiff who alleges that he started working for China Fun on August 22, 2010, clearly worked during the NYLL statute of limitations period and therefore has no tolling claims for the Court to decide. On the other hand, the remaining two Plaintiffs, Weizhen Song, who claims to have begun working for Defendants on May 16, 2006 and stopped working for Defendants on March 31, 2007, and Guangli Zhang who claims to have begun working for Defendants on March 1, 2005 and stopped working for Defendants on December 5, 2010, both worked either entirely or partially outside of the statute of limitations period. Accordingly, these two Plaintiffs bear the burden of proof to demonstrate why the time period applicable to each of their individual circumstances should be tolled. As discussed in more detail below, there is no evidence to support their equitable tolling claims. Plaintiffs' complete failure to submit proof as to these individuals merits summary judgment for Defendants and an order dismissing all of their time-barred claims.

Second, there is nothing "extraordinary" about the circumstances identified by Plaintiffs. Courts in this Circuit have rejected these arguments time and time again. Plaintiffs' limited education, English proficiency and financial means are not uncommon traits among litigants, and they have failed to proffer an explanation for how their own particular circumstances prevented them from timely pursuit of their claims. Plaintiffs argue that Defendants' failure to post wage-and-hour notices or keep accurate time records also sets them apart, but both of these theories of liability are asserted in nearly every restaurant wage-and-hour case. Plaintiffs also accuse China Fun of hiding certain facts that thwarted them from pursuing their rights, but the facts that they cite are either irrelevant (*i.e.*, the existence of a New York State Department of Labor investigation) or go to the merits of the minimum wage and overtime claims (*i.e.*, "manipulated" time records).

Finally, Plaintiffs have utterly failed to meet their burden to establish that they exercised reasonable diligence during the relevant time period(s). Those who left China Fun before the expiration of their statute of limitations period offer no explanation as to why they waited until 2014 to file suit; especially in light of the fact that a related lawsuit had already been filed in 2012. Moreover, China Fun's employees who worked after 2009 signed ample documentation (in English *and* in Chinese) acknowledging that they understood how they were being compensated and that they were informed of their legal rights. Plaintiffs' motion falls short of establishing some sort of scheme to create a false paper trail designed to conceal alleged wage violations.

Simply repeating the phrase "rock bottom wages" in a sea of scandalous and unsupported accusations is not enough to toll the claims of the three Plaintiffs here. Because Plaintiffs cannot meet their burden of proof at trial, summary judgment should be granted for Defendants and Plaintiffs' time-barred claims should be dismissed.

SUMMARY OF RELEVANT FACTS[1]

Plaintiffs are former delivery workers of the China Fun Restaurant located on Manhattan's East and West Side.[2] Most of the Plaintiffs reported to the Restaurant's delivery manager, *i.e.*, Leimin Fang (until October 2011) or Jimmy Chen (since then). (56.1 ¶ 3.) The delivery manager has always manually kept track how much delivery workers earn in tips each shift. While the delivery workers have always been entitled to take home the amount of tips they earned at the end of each shift in cash, over time, the Restaurant began overhauling its payroll system, which affected how their wages were paid. (56.1 ¶¶ 5.) In June 2007, the Restaurant began issuing paystubs setting forth an itemized list of tax withholdings. (56.1 ¶¶ 8.) Delivery workers signed a copy of their paystub (in English) as well as a cash payment receipt (in Chinese) to acknowledge that they were paid (in cash) every two weeks. (56.1 ¶ 8.) The Restaurant also posted state and federal wage notices[3], and revised the "Attendance Sheet" form in an effort to keep more precise records of the actual hours worked. (56.1 ¶¶ 7, 16.)

In March 2009, the Restaurant installed a time clock (in the same area as the wage-and-hour notices) to track employees' hours via a fingerprint scanner. (56.1 ¶ 10.) The delivery manager also continued to keep manual time records until management insured that there were no problems with the new technology. (56.1 ¶ 10.) In October of 2010, the Restaurant ceased using the Attendance Sheets altogether and delivery workers started signing copies of their

[1] References to Defendants' Local Rule 56.1 Statement of Material Facts and the evidence cited therein are indicated as "56.1 ¶_."

[2] The only corporate Defendant identified in this action is China 1221, Inc., d/b/a China Fun, located at 1221 Second Avenue, New York, NY 10065 (also known as "China Fun East Side;" hereafter "China Fun" or the "Restaurant."). Defendants reserve the right to seek dismissal of any plaintiff who claims to have worked at any other location because these individuals have failed to establish an employment relationship with China 1221, Inc..

[3] These notices were updated with each increase in minimum wage. (56.1 ¶¶ 41, 43-44.)

weekly time records each pay period. (56.1 ¶ 12.) These reports showed daily time punches over the course of a given week, with handwritten notes on how their wages were calculated (including any additional pay they received for working overtime, or a ten-hour-spread). (56.1 ¶ 13.) By then, the Restaurant had also started paying all employees via paycheck. (56.1 ¶¶ 13-14.) Shortly thereafter, the Restaurant began issuing annual wage notice forms required under the 2011 amendments to the NYLL (in English and Chinese). (56.1 ¶¶ 19-21.)

Zhongwei Zhou claims he worked at China Fun East Side from August 21, 2010 until March 31, 2013. (56.1 ¶ 24.) Plaintiff Weizhen Song claims he worked at China Fun East Side from May 16, 2006 until March 31, 2007. (56.1 ¶ 25.) Plaintiff Guangli Zhang claims he worked at China Fun East Side from March 1, 2005 to December 5, 2006, and at China Fun West Side from December 6, 2006 to December 5, 2010. (56.1 ¶ 26) All Plaintiffs, spent the overwhelming majority of their alleged employment dates at China Fun after the Restaurant posted wage and hour notices on June 11, 2007. (56.1 ¶ 27.) In addition, plaintiffs signed documentation acknowledging information about their rates of pay. (56.1 ¶ 27.)

ARGUMENT

I. LEGAL STANDARD

A. Standard Applicable on a Motion for Summary Judgment

Under FRCP Rule 56(c), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law," and it is genuinely in dispute "if the evidence is such that a reasonable [finder-of-fact] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party can satisfy this burden by showing that the non-moving party "failed to … establish the existence of an element essential to [the non-moving] party's case, and on which [the non-moving] party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322; *see also Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013) (summary judgment is appropriate when the non-moving party fails to proffer sufficient evidence that would permit "a reasonable [trier-of-fact] to return a verdict in his … favor … on an essential element of [his] claim"). "This standard applies equally to cases, like the instant one, in which both parties moved for summary judgment." *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 96 (2d Cir. 2007).

B. Standards Governing the Timeliness of Plaintiffs' Claims

"The lapse of a limitations period is an affirmative defense that a defendant must plead and prove." *Staehr v. Hartford Fin. Servs. Grp.,* 547 F.3d 406, 425 (2d Cir. 2008). Claims arising under the Fair Labor Standards Act ("FLSA") are subject to a two- or three-year limitations period (depending on whether the violations are ultimately found to be willful), while claims arising under the New York Labor Law ("NYLL") are subject to a six-year limitations period (regardless of whether the violations are found to be willful). 29 U.S.C. § 255(a); N.Y. Labor Law §§ 198(3), 663(3).[4] Both FLSA and NYLL claims accrue on the pay period that corresponds to the time services were rendered for the employer. *Nakahata v. N.Y. Presbyterian Healthcare Sys.,* 723 F.3d 192 (2d Cir. 2013) (internal citations omitted).

The doctrine of equitable tolling "permits courts to extend a statute of limitations on a case-by-case basis to prevent inequity." *Warren v. Garvin*, 219 F.3d 111, 113 (2d Cir. 2000). A

[4] Because Plaintiffs cannot recover under both the NYLL and FLSA for the same injury, and because courts typically award recovery under the statute that provides the greatest relief, it is assumed for the purposes of this Motion that any and all claims that accrued prior to the six-year limitations period under the NYLL are time-barred. *See Maldonado v. La Nueva Rampa, Inc.*, 2012 WL 1669341, at *5 (S.D.N.Y. May 14, 2012) (collecting cases).

plaintiff seeking tolling must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). "Generally, equitable tolling is difficult [for a plaintiff] to attain, as it is reserved for "extraordinary or exceptional circumstances." *U.S. v. All Funds Distributed to Weiss*, 345 F.3d 49, 54 (2d Cir. 2003). The Second Circuit has "defined ... rules [that] allow a court … to make narrow exceptions to the statute of limitations" under sufficiently "compelling circumstances." *Id.* at 54-55 (internal citations and quotations omitted).

A plaintiff bears the burden of proof to demonstrate why his particular circumstances entitle him to equitable tolling. *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506, 512 (2d Cir. 2002). He must show that "a causal relationship between the extraordinary circumstances [he invokes] and the lateness of his filing." *Hizbullahankhamon v. Walker*, 255 F.3d 65, 75 (2d Cir. 2001) (internal citations and quotations omitted). No causal relationship exists if he could have filed on time notwithstanding those circumstances, had he acted with reasonable diligence. *Id.* A plaintiff must show that he "acted with reasonable diligence throughout the [entire time] period he seeks to toll. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (emphasis added). In cases where the "alleged extraordinary circumstances ceased early in the limitations period," the Court's inquiry turns to whether the Plaintiff "diligently pursued his application in the time remaining." *Hizbullahankhamon*, 255 F.3d at 75.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE CLAIMS THAT AROSE PRIOR TO THE STATUTE OF LIMITATIONS

Weizhen Song and Guangli Zhang assert claims that accrued before the most generous time period available for their claims, *i.e.*, six years before they filed their complaint. (56.1 ¶¶ 19-20.) However, there is no evidence that the statute of limitations should be tolled. (*See* Dkt. 49-3, Pls. 56.1.)

Furthermore, it is undisputed that Guangli Zhang, left his employment before December 2006. (56.1 ¶ 26.) That means that he waited until *all* of his claims had lapsed before filing suit. Even if he had proffered any evidence in support of his claim for equitable tolling, a "tolling period cannot delay the expiration of a deadline [that] has already expired." *See Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (2d Cir. 2005)

A. Plaintiffs Have Failed to Identify Any "Extraordinary" Circumstances

Even if was evidence to toll Plaintiffs' wage claims, their grounds for invoking tolling all fail as a matter of law. Plaintiffs have previously argued in the related litigation that the statute of limitations should be tolled because (1) Defendants "treated them like dogs,", (2) their time records were manipulated, and (3) they were never told of a NYSDOL investigation, and (4) they never saw posters at the Restaurant because they were hampered from pursuing their legal rights. (*Sun v. Wu*, Index No. 12-cv-7135, Dkt. 49-2 at 11-12, 17.) Each of these arguments should be rejected by the Court.

1. A Litigant's Indigent Status or "Low Self-Esteem" Cannot Automatically Entitle Him to Tolling

Plaintiffs portray themselves as undocumented immigrants whose limited education, English skills, financial means and familiarity with American legal concepts prevented them from pursuing their rights. (*Sun v. Wu*, Index No. 12-cv-7135, Dkt. 49-2, Pls. Mot. at 16.) But they fail to articulate what, if anything, makes their plight "extraordinary."

Plaintiffs argue that they could not learn about their rights because they could not afford to consult legal counsel. (*Sun v. Wu*, Index No. 12-cv-7135, Dkt. 49-2 at 16.). "A Plaintiff's limited financial means and the inability to afford a lawyer are not 'extraordinary circumstances' that support equitable tolling." *Liu v. Mount Sinai Sch. of Med.*, 2012 WL 4561003, at *5 (S.D.N.Y. Sept. 24, 2012) (Sullivan, J.) *aff'd sub nom.* 2014 WL 1228400 (2d Cir. Mar. 26,

2014) (*citing Apionishev v. Columbia Univ.*, 2011 WL 1197637, at *6 (S.D.N.Y. Mar. 25, 2011) (rejecting homelessness, depression and AIDS as a basis for equitable tolling)). Without any explanation as to how this prevented them from filing on time they fail to meet their burden to establish how or why their poverty posed such an insurmountable challenge. *See Liu*, 2012 WL 4561003, at *5 (explaining that "Plaintiff's limited financial means undoubtedly impacted her ability to retain an attorney" but did not excuse her from timely filing suit).

Plaintiffs also make dramatic allegations about the emotional distress that they suffered as a result of "not [being] treated as human beings, but as a piece of tools, machines or symbols" at China Fun. (*Sun v. Wu*, Index No. 12-cv-7135, Dkt. 49-2 at 16.) But Plaintiffs — who also bear the burden of proof as to whether mental illness tolls their claim, *see Bolarinwa v. Williams*, 593 F.3d 226, 232 (2d Cir. 2010). — have done little more than parrot one another's conclusory allegations of "low self-esteem." This is not sufficient, as *each* Plaintiff must provide a "particularized description" of the type of mental illness and proffer evidence in support of his claim at the summary judgment stage. *See Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000) (rejecting tolling for "conclusory and vague" allegations of "paranoia, panic attacks and depression"); see also *Johnson v. City of New York*, 2012 WL 1076008, at *4 (S.D.N.Y. Mar. 28, 2012) (Sullivan, J.) (denying equitable tolling for plaintiff who failed to identify any evidence in support of his mental illness claim for equitable tolling on summary judgment). Therefore, Plaintiffs' purported low self-esteem cannot be a basis for equitably tolling their claims.

2. Plaintiffs Were Not Deceived or Thwarted from Discovering Potential Claims

a. The "Manipulated" Time Records Put Plaintiffs on Notice of Potential Claims

Plaintiffs cite alleged discrepancies in time clock records generated by the fingerprint scanner as evidence of intentional conduct by Defendants "to conceal … [a] factual element of their [Plaintiffs'] cause of action." (*Sun v. Wu*, Index No. 12-cv-7135, Dkt. 49-2 at 14.) As However, in the related action, Plaintiffs Hengjin Sun and Jiaching Sun conceded that the reason they were able to identify any discrepancies in the first place is because those records did not comport with their *own* knowledge about *how many hours they worked.* Put another way, time records, by definition, cannot conceal the existence of a wage-and-hour claims; if anything, they would only *reveal* them. *See, e.g., Morris v. Alle Processing Corp.*, 2013 WL 1880919, at *3 (E.D.N.Y. May 6, 2013) (explaining plaintiffs' theory of how time punch records supported their claim that defendants unlawfully shaved their time). In any event, to the extent these records conflict with Plaintiffs' testimony, this would be a triable issue of fact on the merits of Plaintiffs' time-shaving claims but do not support a claim to extend the statute of limitation. *See Maldonado v. La Nueva Rampa, Inc.*, 2012 WL 1669341, at *3 (S.D.N.Y. May 14, 2012) (explaining that if an employer fails to keep accurate time records, the burden shifts back to the employee to establish the number of hours they worked).

In any event, the record is clear that the Restaurant provided Plaintiffs with ample information about how their pay was calculated (in both English and Chinese) and signed off on any adjustments to stray punches with their manager. (56.1 ¶¶ 10, 13, 15, 16, 18.) Plaintiffs cannot argue that the Restaurant *concealed* any information from them if there "manipulated" records would have enabled them to determine that they were underpaid. Since neither Plaintiff can claim that they were unaware of how many hours they worked (or how much they were paid), their own *awareness* of their claims is not the issue, and equitable tolling is not warranted in either of their cases. *Lanzetta v. Florio's Enters.*, 763 F. Supp. 2d 615, 623 (S.D.N.Y. 2011) (explaining that plaintiff who acquiesced to being paid solely in tips failed to establish that she was unaware of the facts underlying her claims).

b. Plaintiffs Were not Prevented from Learning of their Rights from the NYSDOL

In the related action, Plaintiffs also claim that Defendants hid the existence of the NYSDOL investigation from them, and that they were also asked to help the Restaurant mislead the investigators in this "secret" investigation. (*Sun v. Wu*, Index No. 12-cv-7135, Dkt. 49-2 at 12-13.) Even if either assertion were true (which they are not), they do not rise to the level of deceptive conduct necessary for Plaintiffs to meet their burden.

First, the fact that Defendants allegedly failed to disclose the existence of a pending NYSDOL investigation of China Fun East Side to Plaintiffs, or did not actively inform them that they "could seek help" from the NYSDOL to protect their rights, is not the same as *preventing* them from learning about their rights. By the time the investigation of China Fun East Side was initiated in December 2007, only one Plaintiff Guangli Zhang, was employed by the Restaurant and he was not even working at the site being investigated. (56.1 ¶ 28.)

Assuming *arguendo* that the Defendants tried to hide this information from Plaintiffs (which they did not), the existence of an investigation (or Plaintiffs' knowledge of one) is not a necessary element of any of the claims they assert here. *See Lin v. Chinese Staff & Workers' Ass'n*, 2012 WL 5457493, at *7 (S.D.N.Y. Nov. 8, 2012) (Sullivan, J.) *aff'd*, 527 F. App'x 83 (2d Cir. 2013) (explaining that Second Circuit allows for a statute of limitations to be tolled on fraudulent concealment grounds only "where the alleged fraud concerns a factual predicate of a plaintiff's cause of action but not where it concerns the state of the law.").

Plaintiffs' sweeping proclamations of Defendants' alleged willful or intentional deceit are based on nothing more than their self-serving allegations and are belied by Defendants' documented efforts to the contrary. In any event, "[t]he relevant question [for equitable tolling purposes] is not the intention underlying defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action." *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004); *see also Paige v. Police Dep't of Schenectady*, 264 F.3d 197, 200 (2d Cir. 2001) (denying tolling where the allegedly concealed facts would have only strengthened plaintiff's case and did not justify her failure to pursue her cause of action in their absence). As explained further below, Plaintiffs failed to act reasonably here.

3. Even If True, Failure to Post Wage-and-Hour Notices Does Not Amount to an Automatic Toll of the Statute of Limitations

Plaintiffs' primary basis for invoking equitable tolling is Defendants' alleged failure to post wage-and-hour notices in the Restaurant. (*Sun v. Wu*, Index No. 12-cv-7135, Dkt 49-2 at 6-11.) But no triable issue of fact exists as to whether any alleged failure to post notices in the Restaurant could justify tolling Plaintiffs' claims. "An employer's failure to tell a plaintiff of her legal rights is not by itself sufficient … the employer or some other exceptional circumstance must have actually prevented the exercise of plaintiff's legal rights in some way.…To hold otherwise would be tantamount to holding that the statute of limitations should be tolled in nearly every wage-and-hour case." *Upadhyay v. Sethi*, 2012 WL 3100601, at *2 (S.D.N.Y. July 31, 2012) (internal citations and quotations omitted); *see also Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 318 –19 (S.D.N.Y.2011) (equitable tolling not warranted where employer failed to post notice because "there is no allegation that defendants engaged in anything more, *e.g.*, some sort of deception") (internal citations and quotations omitted).

Although Plaintiffs have managed to assert conclusory allegations of fraudulent conduct by Defendants to bolster their failure-to-post claim, they conveniently ignore the fact that *three* of the Plaintiffs who submitted affidavits left China Fun before any time records were ever "manipulated" and *four* had left by the time any affidavits containing "false" information were prepared for the NYSDOL. Because neither of these "frauds" could have worked to deter them from pursuing their claims, Plaintiffs' failure-to-post claim is really a merits argument in disguise.

Plaintiffs would have the Court believe that their case is no different from *Ke v. Saigon Grille, Inc.*, 595 F. Supp. 2d 240 (S.D.N.Y. 2008), where the court found — following a bench trial — that there was evidence that the employer's failure to post was "presumably quite intentional" given that it was an essential part of the "extreme measures" they took to minimize labor costs when employees started to demand better pay. *Id.* at 259. But the record does not support such a conclusion here, when it is undisputed that Defendants have been issuing pay stubs and withholding taxes (even when wages were paid in cash), posting notices and requiring employers to provide written acknowledgements throughout the duration of the relevant time period (in both English and in Chinese). (56.1 ¶¶ 34-35, 42, 44-45.) Because Plaintiffs cannot meet their burden of proof to establish any extraordinary circumstances to the contrary, dismissal of their time-barred claims is warranted at this stage.

B. Plaintiffs Cannot Meet Their Burden to Establish Due Diligence

Even if Plaintiffs "could rely on equitable tolling on the basis of defective notice," [they] [w]ould forfeit that right if [they] failed to exercise due diligence to the prejudice of the defendant." *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 183 (2d Cir. 2008) (internal citations omitted). Instead, they must be prepared to show that they acted with "reasonable diligence" to suggest that it was the extraordinary circumstances that they evoke which *caused* them to untimely file suit. *See Hizbullahankhamon*, 255 F.3d at 75. The Second Circuit has "made it clear that [the court only] had in mind situation[s] where a plaintiff could show that it would have been *impossible* for a reasonably prudent person to learn about his or her cause of action" in order for equitable tolling to be justified. *Pearl v. City of Long Beach*, 296 F.3d 76, 84-85 (2d Cir. 2002) (internal citations omitted). Plaintiffs have not proffered any evidence to suggest a triable issue exists on this point.

1. Plaintiffs Delayed Pursuit of their Claims Establishes That They Were Not Reasonably Diligent

Extensive delays alone constitute "sufficient evidence that a party was not reasonably diligent in its efforts." *Kantor-Hopkins v. Cyberzone Health Club*, 2007 WL 2687665, at *6 (E.D.N.Y. Sept. 10, 2007); *see also Warren*, 219 F.3d at 113-14 (explaining that a prolonged "period of inactivity [cannot be seen] as anything other than a marked lack of diligence"). A party must act as "expeditiously as was feasible" under the circumstances. *Kantor-Hopkins*, 2007 WL 2687665, at *6 (internal citations and quotations omitted). There is no evidence to suggest that Plaintiffs acted in a reasonably timely fashion here.

The Plaintiffs have all failed to proffer any evidence of what, if anything, they did to enforce their rights during the pendency of the statute of limitations period. For any of them to prevail, they "must have exercised diligence in pursuing the discovery of [their] claim[s] *during the entirety of the period* [they] seek [] to have tolled. Thus, when a party has failed to acquire the knowledge or documents necessary to bring suit because of its own delinquency, equitable tolling is not an appropriate remedy." *Upadhyay*, 2012 WL 3100601, at *1 (*citing Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000)). The total absence of evidence on their efforts mandates only one conclusion: that they were utterly delinquent in pursuing their claims after leaving China Fun. Courts have been less forgiving of much shorter lag times. *See Bertin v. United States*, 478 F.3d 489, n.3 at 494 (2d Cir. 2007) (petitioner who delayed three years to file motion did not act with reasonable diligence).

While they may attribute this delay to language barriers and their lack of knowledge about the law, neither of these reasons are an excuse. See *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008) (explaining that prisoners who failed to mitigate their language deficiency failed to exercise diligence in learning the legal requirements for filing a habeas petition); *see also Ormiston v. Nelson*, 117 F.3d 69, n.5 at 73 (2d Cir. 1997) ("Mere ignorance of the law is…insufficient to delay the accrual of the statute of limitations.").

Finally, to the extent that Plaintiffs seek to toll the limitations period with respect to their *entire* employment history with China Fun (*i.e.*, as far back as 1998), they are not entitled to do so when they did not start exercising any efforts to pursue their legal rights until 2014 — *after* those claims had already expired. One of the factors identified by the Second Circuit for evaluating a party's diligence is whether he made "efforts at the earliest possible time to secure counsel." *Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003). Here, it is undisputed that Plaintiffs made no such efforts until the fall of 2014. Because the statute of limitations had already expired as to the claims that accrued at the beginning of their employment, their efforts were too little, too late. "Because these events do not relate to [their] efforts to pursue and protect [their] rights during the limitations period . . . they could not have stood in the way of [their] timely filing the complaint." *Liu*, 2012 WL 4561003, at *5.

2. The Court Apply Its Holding in the *Sun* Action Here

As the Court is aware, in the related proceeding, *Sun v. Wu*, Index No. 12-cv-7135, the Court was confronted with this identical issue and held that Plaintiffs are not entitled to equitable tolling. *Sun v. Wu*, Index No. 12-cv-7135 Docket No. 126. Plaintiffs have not introduced any evidence that the circumstances confronting the three Plaintiffs in this proceeding differed in any material way from the circumstances concerning the employment history of the plaintiffs in the *Sun* action. As a result, the same result should follow.

CONCLUSION

For the reasons set forth above, Defendants respectfully request an Order granting Defendants' motion to dismiss all of Plaintiffs' time-barred claims with prejudice.

Dated: June 24, 2016

Respectfully submitted,

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